

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**DOUGLAS EMMETT MANAGEMENT,
LLC**

Employer

and

Cases 31-RM-264449

**INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 501-
AFL-CIO**

Union

EMPLOYER’S OPPOSITION TO REQUEST FOR REVIEW

Pursuant to Section 102.67(f) of the Rules and Regulations of the National Labor Relations Board (“NLRB”), Douglas Emmett Management, LLC (“Employer” or “Douglas Emmett”) files this Opposition to Request for Review. As demonstrated in the Regional Director’s December 16, 2020 Decision Disposing of Objections and Determinative Challenges and January 28, 2021 Decision Disposing of Objections and Certification of Results (collectively, the “RD’s Decisions”) and herein, none of the objections or challenges advanced by the International Union of Operating Engineers, Local 501 (“Union”) possess merit. Accordingly, Respondent respectfully requests that the Board deny the Union’s Request for Review (“RFR”) in its entirety.

I. General Factual and Procedural Background

The Employer owns and operates approximately 18 million square feet of office space and 3,320 apartment units in Los Angeles County. These properties include locations in Santa Monica, California. Engineers at the properties perform maintenance functions throughout the buildings.

Four (4) engineers work in the Santa Monica bargaining unit. On February 23, 2018, in Case No. 31-RC-213147, the Region certified the Union as the representative of that unit. The parties engaged in first contract bargaining following certification, but did not reach a first contract agreement.

In March 2020, the Employer received evidence of loss of majority support from the Santa Monica bargaining unit, and on March 23, 2020 filed an RM Petition in Case No. 31-RM-258277. The Employer later withdrew the Petition on April 7, 2020, and re-filed on April 8, 2020 in Case No. 31-RM-258945. The Employer then withdrew that case on August 10, 2020, and re-filed on August 11, 2020 as Case No. 31-RM-264449 (the instant case).

The Union refused to stipulate to an election, but also failed to timely file a pre-hearing Statement of Position on the Employer. As a result, on September 10, 2020, the Region found the Union precluded from raising the issues identified in its Statement of Position (including the transfers complained of in its RFR here), and directed a mail ballot election to occur between September 25, 2020 and October 16, 2020, with an October 20, 2020 ballot count.

The Regional Director's Decision and Direction of Election noted:

The Union argues that preclusion in the instant case will allow the Employer to prevail on the issues raised by its Statement of Position and that this contradicts the Board's obligation and duty to enforce the policies of the Act. I disagree. While a procedural rule will at times prevent a substantive issue from being addressed, that is not an unintended consequence of a preclusion rule, but the intent. Sections 102.63(b)(2) and 102.66(d) of the Board's Rules are clear in their operation, and nothing in the Union's offer of proof articulated at the hearing provides a valid basis for ignoring the preclusion dictated by the Board's Rules[.]

DDE, p. 2.

At the October 20, 2020 count of the four mail ballots returned (the entirety of the unit), the Union challenged the ballots of engineers Luis Augustin and John Roman on the basis of: "Inserted into unit, New Job classification, Employer packing unit." The Employer challenged the

ballot of Adelberto Moreno as “Not activity employed.” Because these challenges left only the ballot of engineer Jose Morales remaining, the parties agreed his ballot should be challenged by the Board to preserve voter secrecy. The Union then filed objections on October 26, 2020.

On December 16, 2020, the Regional Director issued a Decision Disposing of Objections and Determinative Challenges (the first of the Decisions challenged by the Union here), rejecting both parties’ challenges¹ and the Union’s objections, and ordering that all four ballots be opened and counted. The Region counted the ballots on January 19, 2021, resulting in a tally of two (2) “Yes” votes in favor of Union representation, and two (2) “No” votes against Union representation.

On January 26, 2021, the Union filed objections substantively identical to its October 26, 2020 objections. On February 1, 2021 the Region issued the second of the Decisions challenged by the Union here – a Decision Disposing of Objections and Certification of Results. This Decision again rejected the Union’s objections. The Union then filed its Request for Review on March 2, 2021, seeking review of the RD’s Decisions rejecting its objections and challenges.

II. To the Extent They Can Be Discerned, the Union’s Objections and Challenges Lack Any Cognizable Basis in Fact or Law.

A. Identification of the Union’s Objections and Challenges

Because the Union’s Request for Review fails to articulate clearly the issues it raises, a review of the underlying objections and challenges may assist in discerning the questions before the Board.

First, as noted above, the Union’s challenges to the ballots of John Roman and Luis Augustin state, “Inserted into unit, New Job classification, Employer packing unit.” Meanwhile, the Union’s objections state:

¹ The Employer has not requested review of the decision to overrule its challenge.

Objection 1: The Employer did not maintain laboratory conditions for the election by terminating a known Union supporter.

Objection 2: The Employer did not maintain laboratory conditions for the election by transferring two employees from a non-union shop into the bargaining unit with the purpose of defeating majority support.

Objection 3: The Employer transferred the two employees into the bargaining unit and created new senior positions for them and paid them at much higher rates than the others in the bargaining unit. The Union asserts that the promotions with pay raises were an inducement to vote against the Union and were sufficiently valuable and desirable, which resulted in the election process being materially altered.

Objection 4: The Employer did not disclose the creation of the new positions or transfers and thereby deprived the Union with opportunity to bargain on the existing employees' behalf for the promotional opportunities.

These objections and challenges distill down to only two distinct issues. First, the Union appears to allege the Employer engaged in objectionable conduct by transferring Roman and Augustin into the bargaining unit, that those employees are somehow ineligible to vote, and that their wage rates evince an intent to influence the election. This issue covers the "Inserted into unit, New Job classification, Employer packing unit." claim common to all both challenges and, it appears, objections two (2) through four (4).

Second, Union objection one (1) raises the August 2, **2018** discharge of former engineer Luis Pasillas. The Union challenged Pasillas' discharge in Case No. 31-CA-224885, dismissed by the Region on September 28, 2018, without an appeal by the Union.

B. The Union is Barred from Raising Either of the Issues Covered by Its Objections and Challenges Because the General Counsel has Rejected Those Contentions in Unfair Labor Practice Proceedings, and Any New Such Charges Would be Time-Barred by Section 10(b) of the Act.

1. Factual Background of Transfers

For many years, dating long before the Union's certification, the Employer has maintained a past practice of transferring employees amongst facilities to address operational needs. In late 2019 and early 2020, the Employer experienced significant manpower challenges at its Santa

Monica facilities. The Union raised these staffing issues during bargaining. Indeed, even its Request for Review here complains two Santa Monica engineers “were forced to man their building portfolio alone.” (RFR at p. 2).

Consequently, in January 2020, the Employer transferred engineers John Roman and Luis Augustin to Santa Monica facilities. The Employer explicitly notified the Union of these engineers’ transfers and continuing wage rates at the time, discussed the transfers during bargaining, and provided both engineers’ personnel files and other information. At no point, other than in these proceedings, did the Union object to the inclusion of Roman or Augustin in the bargaining unit, nor did it request further discussion with the Employer regarding their inclusions or transfers.

In Case No. 31-CA-258352, the General Counsel rejected the Union’s unilateral change allegations regarding purportedly “new” job positions, transfers, and pay rates for transfers. The Region dismissed those allegations on June 25, 2020, and on October 30, 2020, the Office of Appeals denied the Union’s appeal. As the Region and the Office of Appeals correctly noted, the purportedly “new” job positions (for example, “Apprentice I” rather than simply “Apprentice”) represent mere designations with no impact on terms and conditions of employment, and Roman and Augustin’s pay rates were merely the rates they possessed when they transferred into the unit, consistent with longstanding past practices.

2. The Employer Discharged Luis Pasillas for Legitimate Reasons More Than Two (2) Years Before the Election.

The Region rejected the Union’s first objection because its Offer of Proof provided no evidence that Pasillas’ August 2, 2018 discharge occurred within or near the critical period for the August 11, 2020 petition here. The Region’s determination is, of course, correct. The Union

cannot credibly argue a two-year-old discharge interfered with laboratory conditions for this election.

To the extent the Union's factual contentions regarding Pasillas warrant any response whatsoever, its assertions are flatly false. The Union argues in its RFR the Employer discharged Pasillas for "nebulous" reasons, first concocted "a series of minor infractions that were all baseless and successfully rebutted[,]" and ultimately discharged him for merely accepting a phone call while on the clock. (RFR at pp. 1-2). In reality, and as the Region found in Case No. 31-CA-224885, a thorough Employer investigation prompted by objective evidence revealed a longstanding pattern of Pasillas utilizing Employer resources, while on the clock, to knowingly violate policies against outside employment. The discharge comported with the Employer's past practices, treatment of similarly-situated employees, and Board standards.

For all of these reasons, the Board must uphold the Region's rejection of the Union's objection regarding Luis Pasillas.

3. *Texas Meat Packers*, 130 NLRB 279 (1961) and Critical Period Standards Preclude the Union's Objections and Challenges.

As explained above, the Union's objections and challenges regarding transfers raise the same issues rejected as unilateral change allegations in Case No. 31-CA-258352, and its Luis Pasillas objection raises the same discharge allegation dismissed in Case No. 31-CA-224885. Moreover, to the extent the Union's objections and challenges regarding transfers raise any unilateral change allegations not covered by 31-CA-258352, it cannot now file such a new charge due to Section 10(b) of the Act. In addition to its notification to the Union more than six months ago of these engineers' transfers, pay rates, and positions, the Employer listed their identities and positions in Attachment B to its Statement of Position in Case No. 31-RM-258277, filed March 23, 2020.

In the absence of a Complaint, the Board will not consider such unfair labor practice issues in objections or challenge proceedings. Thus, if the General Counsel has dismissed an unfair labor practice allegation with respect to conduct that is also alleged as objectionable conduct, the Board will defer to the General Counsel's dismissal where "the conduct which is alleged to have interfered with the election could only be held to be such interference upon an initial finding that an unfair labor practice was committed." *Texas Meat Packers*, 130 NLRB 279, 280 (1961). Similarly, the Board will not inquire into an objection where "the gravamen of this contention is an unfair labor practice requiring a finding that the Employer's conduct constituted a violation[.]" *Id.* at 279. Such a finding in a Representation case "would conflict with the statutory scheme which vests the General Counsel with final authority as to the issuance of complaints based upon unfair labor practice charges and the prosecution thereof." *Id.* See also *McLean Roofing Co.*, 276 NLRB 839, 830 fn. 1 (1985); *Virginia Concrete Corp.*, 338 NLRB 1182, 1185 (2003) (applying these principles to Section 8(a)(5) issues).

Similarly, the RD's Decisions properly find that all of the Union's objections pertain to conduct occurring outside the critical period. The RFR does not object to or otherwise challenge that finding. Indeed, no facts or law exist which could undermine the Region's correct application of the Board's critical period standards.

The Union also attempts to evade *Texas Meat Packers* and critical period standards by vaguely claiming the transfers somehow interfered with laboratory conditions. However, it does not, and cannot, explain *how* the transfers interfered with laboratory conditions. If the transfers were not unlawful unilateral changes, then nothing prevented the Employer from assigning Roman and Augustin to the Santa Monica facilities. Surely the Union cannot claim these employees, who worked in the bargaining unit for many months prior to the petition and the election, somehow

possessed no right to vote in the Board election. Absent other unlawful conduct, no Board law supports the Union's "packing unit" theory of objections and challenges.

Furthermore, the Union cites no evidence the Employer knew how Roman or Augustin felt about the Union prior to their transfers, nor any evidence that the Employer offered inducements to undermine the Union. Indeed, the wage rates pointed to by the Union simply reflect the rates those employees brought into the unit from elsewhere. The Union offers no reason to believe those rates resulted from anything other than the employees' experience levels, skills, and abilities.²

For all of these reasons, the Union cannot now challenge the transfers of the employees subject to its objections and challenges, nor any of the circumstances surrounding those transfers.³

///

///

///

² To the extent wage rates elsewhere may have generally exceeded those paid to bargaining unit employees, such lower unit rates would reflect only the fruits of bargaining with the Union over annual wage increases since its certification. As the Administrative Law Judge noted in 31-CA-206052 and 31-CA-211448 (Decision adopted by the Board at 370 NLRB No. 92 (Feb. 23, 2021)), Board law requires the Employer to implement the results of such bargaining.

³ The Board may also find the Union precluded from litigating the transfers issue because, as the Regional Director found, its failure to timely serve a pre-hearing Statement of Position on the Employer results in such preclusion under Rules 102.63(b)(2) and 102.66(d).

III. Conclusion

For all of the reasons stated above, as well as the reasons articulated in the RD's Decisions, the Union's objections and challenges must be overruled. As a result, the Employer respectfully requests that the Board deny the RFR and affirm the RD's Decisions and Certification of Results.

Respectfully submitted this 9th day of March, 2021.

OGLETREE, DEAKINS, NASH, SMOAK
& STEWART, P.C.

/s/ Daniel A. Adlong
Daniel A. Adlong
Park Tower, Fifteenth Floor
695 Town Center Drive
Costa Mesa, CA 92626
Telephone: (714) 800-7902
Facsimile: (714) 754-1298
Daniel.Adlong@ogletree.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of March 2021, this **OPPOSITION TO REQUEST FOR REVIEW** was filed electronically and service copies sent via electronic mail to:

Adam N. Stern, Esq.
laboradam@aol.com
Justin M. Crane, Esq.
jcrane@myerslawgroup.com
The Myers Law Group, A.P.C.
9327 Fairway View Place, Suite 100
Rancho Cucamonga, CA 91730-0969

Counsel for the Union
International Union of Operating
Engineers, Local 501, AFL-CIO

Mori P. Rubin, Regional Director
mori.rubin@nlrb.gov
National Labor Relations Board, Region 31
11500 West Olympic Blvd., Suite 600
Los Angeles, CA 90064

A handwritten signature in black ink, appearing to read 'Daniel A. Adlong', is written above a horizontal line.

Daniel A. Adlong